No. 41945-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL ALLYN ELLISON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-02462-1
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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2. In denying Michael Ellison's CrR 3.6 motion to suppress, the trial court erred when it entered Finding of Fact 1 and Finding of Fact 14.

3. In denying Michael Ellison's CrR 3.6 motion to suppress, the trial court erred when it concluded that Arizona v. Gant only applies to searches of automobiles incident to the arrest of its occupants.

4. In denying Michael Ellison's CrR 3.6 motion to suppress, the trial court erred when it concluded that State v. Smith was controlling.

5. In denying Michael Ellison's CrR 3.6 motion to suppress, the trial court erred when it concluded that the search of Ellison's backpack was justified as a search incident to arrest, even though Ellison was handcuffed and secured away from the backpack and could not have accessed its contents at the time of the search.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Are the trial court's Findings of Fact 1 and 14 supported by

substantial evidence in the record? (Assignment of Error 2)

2. Did the trial court err when it found that the search of Michael Ellison's backpack was justified for officer safety and to prevent destruction of evidence, even though Ellison was handcuffed and secured away from the backpack at the time of the search? (Assignments of Error 1 & 5)

2. Does the United States Supreme Court's holding in Arizona v. Gant, which limited vehicle searches incident to the arrest of the vehicle's occupant to circumstances where the occupant is still able to access the vehicle to obtain a weapon or destroy evidence, also apply to searches of personal items such as a backpack? (Assignments of Error 1 & 3)

3. Are cases that affirmed searches of personal items conducted while the owner is secured and unable to access the item still good law, where they relied upon expansive but now-rejected interpretations of the search incident to arrest exception to the warrant requirement? (Assignments of Error 1 & 4)

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

Shortly after midnight on June 4, 2010, Tacoma Police Officers Eric Barry and Brett Beall responded to a 911 call from a female homeowner reporting that her estranged boyfriend, Michael Ellison, was outside her home and refusing to leave the property. (RP 10, 37-38) While en route, the Officers ran Ellison's name through their records database and learned that Ellison had several outstanding arrest warrants. (RP 10-11)

When the Officers arrived at the home, they parked in the alley behind the house, and began looking for Ellison. (RP 12, 13, 38) Officer Barry began to search the back yard while Officer Beall walked through the side yard towards the front of the house. (RP 13, 39) In a covered carport/patio area, Officer Barry noticed furniture and other items stacked and covered with a blanket. (RP 13) Officer Barry lifted the blanket and saw two feet. (RP 13-14) Officer Barry removed the blanket and saw Ellison sitting in a chair, with a blue backpack resting between his feet. (RP 14) Officer Barry ordered Ellison to move away from the chair and to show his hands, but Ellison did not immediately comply. (RP 14)

Officer Barry called to Officer Beall, who returned to the back

yard to assist. (RP 14, 39) The Officers directed Ellison to lie on the ground with his hands behind his back, which he did, and Officer Beall placed him into handcuffs. (RP 15, 41-42, 74, 75) The Officer verified Ellison's identity and confirmed that he had several outstanding arrest warrants. (RP 18, 42, 43) The Officers then formally placed Ellison under arrest. (RP 19, 42) During a pat-down search of Ellison's person, the Officers found two cellular phones and a glass pipe containing what appeared to be marijuana residue. (RP 53)

The Officers asked Ellison if the blue backpack belonged to him, and he said it did. (RP 20, 49) While Ellison sat handcuffed on the ground, Officer Beall thoroughly searched the backpack. (RP 20, 30, 52, 78, 81) The Officers testified that the search was conducted incident to arrest and for officer safety, because they did not want to place the backpack into the patrol car and transport it to the jail unless they verified that it contained no weapons or contraband. (RP 24, 25, 32-33, 52, 54)

The backpack contained financial documents, checks, identification cards and birth certificates listing names of people other than Ellison, several items of electronic equipment, hypodermic needles, pills, and a digital scale. (RP 55-64)

B. PROCEDURAL HISTORY

The State charged Michael Ellison with 17 counts of second degree identity theft (RCW 9.35.020); 1 count of unlawful possession of payment instruments (RCW 9A.56.320); and 6 counts of second degree possession of stolen property (RCW 9A.56.140). (CP 7-17)

Ellison moved to suppress all of the items found during the search of the backpack. (CP 21-27, 41-48; RP 97-105) The trial court denied the motion, concluding that the search was a valid search incident to arrest and conducted with a legitimate concern for officer safety. (RP 109-13; CP 70-71) (A copy of the trial court's Findings of Fact and Conclusions of Law are attached in Appendix A.)

Ellison decided to submit the case for a bench trial on stipulated facts. (RP 123-24; CP 55-63) The trial court found Ellison guilty on all 24 counts. (RP 125; 76-80)

The State requested an exceptional sentence, on the grounds that the multiple offense policy of the Sentencing Reform Act results in a presumptive sentence that is clearly too lenient. (CP 7-8; RP 129) The State asked that the sentences for counts one and two run consecutive to each other. (RP 133) The trial

court agreed, and imposed a sentence totaling 86 months of confinement. (RP 143-44; CP 89, 92-93, 124-26) This appeal timely follows. (CP 101)

IV. ARGUMENT & AUTHORITIES

When reviewing the denial of a motion to suppress, the court should determine whether substantial evidence supports the challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123 Wn.2d at 644). "A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." Hill, 123 Wn.2d at 647. The trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

A. FINDINGS OF FACT 1 AND 14 ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Findings of Fact 1 and 14 both inaccurately reflect the testimony presented at the CrR 3.6 hearing, and should not be binding on appeal. Finding of Fact 1 states that the officers were

dispatched to a residence "regarding a domestic violence/unwanted person call." (CP 68) However, the officers testified that they were dispatched in response to an "unwanted person" call, specifically an ex-boyfriend refusing to leave the residence. (RP 9-10, 37) While this may have been a "domestic" call, there is no evidence that there had been or might be "violence." Finding of Fact 1 is therefore incorrect in its description of the call.

Finding of Fact 14 states: "At the time of his arrest, the defendant was in possession and control of the blue backpack and all the contents therein and the pack was within the defendant's reasonable reach." (CP 69) The testimony shows that Ellison was in possession of the backpack when he was first discovered and contacted by the officers. (RP 14, 41) But Ellison was not actually placed under arrest until after he was ordered to the ground, placed in handcuffs, and the officers confirmed the arrest warrants. (RP 15, 18, 19, 30, 41-42, 43) Ellison had been separated from his backpack, and was not in control or within reach of his backpack, at the time of his arrest. Therefore, Finding of Fact 14 is also incorrect.

B. THE GANT CASE, WHICH LIMITS A SEARCH OF A VEHICLE INCIDENT TO ARREST TO SITUATIONS WHERE THE ARRESTEE CAN STILL ACCESS THE INTERIOR OF THE VEHICLE, ALSO APPLIES TO SEARCHES OF AN ARRESTEE'S PERSONAL ITEMS INCIDENT TO ARREST.

A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution. See State v. Rankin, 151 Wn.2d 689, 695 92 P.3d 202 (2004); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). A warrantless search is presumed unlawful unless the State proves that it falls within one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). This is a strict rule, and the State bears a "heavy burden" of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

A search incident to arrest has been a long-standing exception to the warrant requirement, and allows an immediate search conducted in order to secure the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685

(1969). This exception has been broadly applied to both searches of bags (such as purses, fanny packs, or backpacks) incident to the arrest of their owners, and to searches of automobiles incident to the arrest of their occupants. See, e.g, State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), State v. Stroud, 106 Wn.2d 144, 150–51, 720 P.2d 436 (1986); State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). However, over time, "the search incident to arrest exception has been stretched beyond [its] underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest." Valdez, 167 Wn.2d at 774.

The limits of a permissible search incident to arrest were articulated by the U.S. Supreme Court in Chimel. In that case, an arrest warrant was issued and a man was arrested at his home for the burglary of a coin shop. 395 U.S. at 753. Upon arrest, the officers searched his entire home, conducting detailed searches of drawers, for approximately 45 minutes to an hour. 395 U.S. at 754. The Court held that the search extended far beyond the arrestee's person and area within his immediate control, and thus was not necessary to secure the safety of the officers or preserve evidence

that could be concealed or destroyed, and was therefore unconstitutional. 395 U.S. at 768.

In Belton, the reasoning in Chimel was adapted to the context of a search incident to arrest involving occupants of an automobile. 453 U.S. at 460. The Belton court cited Chimel for its holding that the scope of the officer's search could extend to the area within the immediate control of the arrestee to prevent the arrestee from securing weapons or concealing or destroying evidence, and reasoned that the occupant of an automobile would have immediate control over the entire passenger compartment. 453 U.S. at 460. Under the facts of Belton, the warrantless search was reasonable, and thus constitutional, because the four arrestees were not physically restrained and were sufficiently proximate to the car to gain access. 453 U.S. at 455.

In State v. Stroud, our Supreme Court noted that the State constitution provides more privacy protection than its Federal counterpart. 106 Wn.2d at 148-50. The Stroud Court nevertheless broadened the scope of the exception, stating: "During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of

a vehicle for weapons or destructible evidence." 106 Wn.2d at 152. Thus, under Stroud, the fact that a defendant is in custody and in a patrol car during the search, and unable to access evidence or a weapon, is immaterial. 106 Wn.2d at 152.

In State v. Smith, our State Supreme Court, relying on Belton, adopted a two-part test to establish the validity of a search incident to arrest: "(1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable." 119 Wn.2d at 681.[1]

The Smith Court held that both requirements were met in that case. As to the first prong:

> Smith was wearing the fanny pack when Officer Gonzales tackled him. The fanny pack fell off during the struggle that preceded the arrest, and was within "one or two steps" of Smith at the time of the arrest. Thus Smith was in actual physical possession of the fanny pack just prior to the arrest, and the fanny pack was within his reach at the moment of arrest.

119 Wn.2d at 682. As to the second prong:

> [Smith] asserts that the fact that he was handcuffed and in the back of the police car when Gonzales

[1] It should be noted as well that the Smith court analyzed the exception under the Fourth Amendment, not under Washington's more protective Article I, section 7 119 Wn 2d at 678, see also Parker, 139 Wn 2d at 493 (Art. I, § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment).

> opened his bag rendered the search unreasonable. . . . We reject [this] argument[] . . . [O]nce she arrested Smith, Officer Gonzales acted reasonably in taking steps necessary to assure her safety. Gonzales' actions were reasonable because Smith initially tried to run away, he disobeyed Gonzales' order to stop, and because the arrest occurred in a parking lot filled with a large group of people. Handcuffing Smith and placing him in the back of the police car prior to any search of the fanny pack were reasonable actions under those circumstances. Therefore the fact that Smith was handcuffed in the back of the police car during the search does not make that search unreasonable.

119 Wn.2d at 682-83.

But in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the United States Supreme Court rejected such broad readings of Belton and of the search incident to arrest exception. In that case, Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. 129 S. Ct. at 1715. Police officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. 129 S. Ct. at 1715.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia. He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant

argued that Belton did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. 129 S. Ct. at 1715.

The Supreme Court agreed, and rejected the prevailing interpretation of Belton as authorizing a vehicle search incident to every recent occupant's arrest. 129 S. Ct. at 1714. The Court specifically held:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S. Ct. at 1723

Our Supreme Court first addressed the Gant holding in State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009), observing:

> [T]he Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Gant, 129 S. Ct. at 1719.

167 Wn.2d at 394. The Court held that likewise, under Washington's Article I, section 7:

> [A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

167 Wn.2d at 383. The risk to officer safety or the possibility that evidence will be destroyed must "exist at the time of the search." 167 Wn.2d at 395.

Then in Valdez, our State Supreme Court again acknowledged the overexpansion of the search incident to arrest exception, holding:

> after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception. Stroud's expansive interpretation to the contrary was influenced by an improperly broad interpretation of Belton[.]

167 Wn.2d at 777. The Court further noted that: "The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of

that exception must be so grounded and so limited." 167 Wn.2d at 775.

In this case, Ellison argued below that the limitations expressed in and subsequent to Gant also apply to searches of personal items. Ellison argued that the Gant holding is not exclusive to searches of automobiles, but extends to searches of other items such as purses and backpacks. (RP 103; CP 24, 47-48) The trial court rejected the argument, concluding that: "The Court's ruling in Arizona v. Gant . . . has not been extended beyond vehicle searches and is therefore not applicable[,]" and that instead State v. Smith "is controlling in this case." (CP 70) The trial court was incorrect on both counts; Division 3 recently determined that Gant applies to searches of personal items incident to arrest, and specifically held that Smith is no longer good law. State v. Byrd, 2011 WL 2802918 (Wash. App Div 3) (a copy of the opinion is attached in Appendix B).

In that case, Lisa Byrd was arrested for possession of stolen property, and after the arresting officer handcuffed Byrd and secured her in his patrol car, he conducted a search of her purse incident to arrest. 2011 WL 2802918 at *1. The trial court, relying on Gant and Valdez, found that the search was improper and

suppressed the contraband found in Byrd's purse. The State appealed, and Division 3 addressed whether Gant applies beyond vehicle searches. 2011 WL 2802918 at *1.

The Byrd court noted that Gant limits Belton, "to authorizing the 'search [of] a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.'" 2011 WL 2802918 at *2. (quoting Gant, 129 S. Ct. at 1719).

The Byrd court also recognized that Washington cases, including Smith, that authorized the search of a vehicle incident to a recent occupant's arrest after the arrestee has been secured and cannot access the inside of the vehicle, were "based on a rejected interpretation of Belton; an interpretation that Gant overruled." 2011 WL 2802918 at *2. The court went on to hold:

> We are bound by Gant's interpretation of Belton. And, while the State argues that Gant should not apply because it involved the search of a vehicle incident to arrest, Gant and Belton simply applied the general rules of the search incident to arrest exception set out in Chimel to the automobile context. A search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse.

2011 WL 2802918 at *2 (citations omitted).

As noted by both the Byrd and Gant courts, Chimel

"continues to define the boundaries of the [search incident to arrest] exception." Gant, 129 S. Ct. at 1716; Byrd, 2011 WL 2802918 at *2. Chimel did not involve the search of a vehicle. And under Chimel, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. Chimel, 395 U.S. at 763–64, 768; Gant, 129 S. Ct. at 1719.

The Byrd court correctly determined that Gant applies to any search incident to arrest, and "an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search." 2011 WL 2802918 at *2 (citing Gant, 129 S. Ct. at 1719; Chimel, 395 U.S. at 763–64, 768). The court also correctly found that because Byrd was secured in handcuffs and in the patrol car when her purse was searched, and that she had no way to access the purse at the time, the justifications for the search incident to arrest exception did not exist. 2011 WL 2802918 at *2.

Similarly here, at the time of the search, Ellison was on the ground away from the backpack with his hands behind his back secured in "double locked" handcuffs, which severely limited his mobility. (RP 30, 74, 75, 78, 81) Ellison could not have accessed the backpack to obtain a weapon or destroy evidence. Ellison was also arrested for outstanding warrants, not for any crime relating to

the backpack. (RP 19) There was no basis for the officers to search the backpack or any other items in the backyard without first obtaining a search warrant.

Officers Barry and Beall justified the search in part because they would not want to place a backpack into their patrol car, and then transfer the backpack to a secured jail facility, unless they were certain that it did not contain dangerous items. (RP 24-25, 32-33, 52) While that may be so, this policy is not a recognized exception to the warrant requirement. Unless the arrestee demands that the personal item be secured and transferred to the jail, and by doing so consents to a search of its contents, then the officers are not obligated to transfer it, and are not entitled to search it.

Furthermore, even if the officers could have done an inventory search before or after arriving at the jail, this does not cure the taint of the prior illegal search, because Washington does not recognize the "good faith" or "inevitable discovery" doctrines. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009); State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

In sum, Ellison was secured in handcuffs and separated from his backpack at the time of the search. Because Ellison was

unable to access the backpack or its contents, there was no threat to officer safety and no possibility that evidence related to his arrest could be destroyed. Under Chimel, Gant, Paton, Valdez, and Byrd, the search incident to arrest in this case was unconstitutional, and all evidence seized as a result of the search must be suppressed. See State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

V. CONCLUSION

The limitations on a valid search incident to arrest, as established by Chimel and reaffirmed by Gant, Paton, Valdez, and Byrd, apply both to searches of automobiles and searches of personal items. A search incident to arrest is necessary only to ensure officer safety and to protect evidence of the crime of arrest. A search incident to arrest is improper if the arrestee is secured and unable to access the interior of the vehicle or personal item. Because Ellison was secured and unable to access the backpack, the justifications for a search incident to arrest were not present, and the search was unconstitutional. The evidence seized as a result of the search should have been suppressed.

DATED: August 9, 2011

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Attorney for Michael A. Ellison

CERTIFICATE OF MAILING

I certify that on 08/09/11, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to. (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave S, Rm 946, Tacoma, WA 98402, and (2) Michael A Ellison DOC# 760530, Airway Heights Corrections Center, P O Box 2049, Airway Heights, WA 99001-2049

Stephanie Cunningham

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APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ADMISSIBILITY OF EVIDENCE CRR 3 6

10-1-02462-1 36115026 FNFCL 03-28-11

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DEPT. 22
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL ALLYN ELLISON Defendant.	CAUSE NO. 10-1-02462-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ADMISSIBILTY OF EVIDENCE CrR 3.6

THIS MATTER came on before the Honorable John R. Hickman, Judge of the above entitled Court on the 7th day of February, 2011. The defendant was present and represented by his attorney, Laura Carnell, and the State was represented by Deputy Prosecuting Attorney Lisa Wagner. The Court read the pleadings submitted by the parties, heard testimony, and observed the demeanor and manner of the witnesses. The Court, having rendered an oral ruling thereon, herewith makes the following Findings and Conclusions as required by CrR 3.6.

FINDINGS OF FACT

1) On June 4, 2010, just after midnight, Tacoma Police Department officers Bret Beal and Eric Barry were dispatched to the residence of Sunshine McDuffie regarding a domestic violence/unwanted person call.
2) Sunshine McDuffie's residence is in Tacoma, Pierce County, Washington;
3) McDuffie reported that her ex-boyfriend, defendant Michael Ellison, was on her back patio and was refusing to leave
4) When the officers arrived they parked their patrol car in the back alley and both initially checked the back yard/patio area, but did not see anyone
5) Officer Beal moved to the front of the residence to contact McDuffie and Officer Barry searched the back patio area.

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6) Officer Barry located the defendant hiding under a blanket that was covering a chair located on the back patio. Officer Beal returned to the back patio when he heard Officer Barry ordering the defendant to show his hands.
7) The defendant did not initially comply with the officer's commands.
8) Both officers observed a blue backpack that had been between the defendant's legs while he was sitting in the chair under the blanket.
9) The defendant detained and placed into handcuffs. After he was detained the officers were advised by LESA records that the defendant had several outstanding warrants that were confirmed.
10) The defendant was placed under arrest on those outstanding warrants.
11) Officers searched the defendant's person incident to arrest and located two cell phones.
12) Officer Beal advised the defendant of his Miranda rights and he stated that he understood his rights and would answer questions.
13) The defendant was asked about the blue backpack that the officers had seen between the defendant's legs. Both officers heard the defendant admit that the backpack was his.
14) At the time of his arrest, the defendant was in possession and control of the blue backpack and all the contents therein and the pack was within the defendant's reasonable reach.
15) Officer Beal searched the defendant's backpack within one to five minutes of the defendant's arrest. The search was conducted in the defendant's presence on the back patio where he was arrested.
16) There was no significant delay between the time of the defendant's arrest and the search of the backpack.
17) In the front pocket of the backpack the officers located two more cell phones and other electronics. When asked if the items were stolen, the defendant shrugged his shoulders and said that a friend had given them to him.
18) In the main section of the backpack officers located numerous financial documents that contained the names and account numbers of different people, checkbooks in the name of other people, birth certificates belonging to other people, copies of email exchanges between the defendant and a female that contained names and stolen account information, and paperwork belonging to the defendant.

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19) Both officers were concerned about officer safety and would not have brought the backpack into their patrol car without searching it first for weapons and other contraband such as drugs and needles.

20) The backpack was large enough to carry several weapons

21) Both officers testified and were credible.

REASONS FOR ADMISSIBILTY OR INADMISSIBILITY OF THE EVIDENCE

1) The Tacoma Police Department officers responded to a domestic violence/unwanted person call, and domestic violence calls are often dangerous

2) It was late at night when the officers were dispatched

3) The defendant was found hiding under a blanket on the back patio of the caller's residence, and did not initially comply with the officer's commands, therefore the officers appropriately had a heightened concern for their safety.

4) The defendant had outstanding warrants.

5) The Court's ruling in *Arizona v Gant*, 556 U.S ___, 129 S Ct 1710, 173 L Ed.2d 485 (2009) has not been extended beyond vehicle searches and is therefore not applicable in this case.

6) *State v Valdez*, 167 Wn.2d 761 (2009) is similarly inapplicable in that it involved a search of a vehicle following the suspect's arrest.

7) *State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992) is controlling in this case

8) The backpack that was searched was within the defendant's control at the time of his arrest and within his reach.

9) The backpack was large enough to carry weapons.

10) The officers had a legitimate concern for their safety based upon the circumstances of the call and the circumstances of the defendant's arrest.

11) The officers searched the defendant's backpack within no more than five minutes of his arrest and did not move the backpack from the patio before conducting the search; therefore the search was contemporaneous with the defendant's arrest.

12) The search of the backpack occurred in the defendant's presence

13) The officers' search of the backpack occurred before the search was rendered unreasonable.

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14) The officers' search of the defendant's backpack was valid under the circumstances of this case. The evidence located during the search of the defendant's backpack is admissible at trial

DONE IN OPEN COURT this 25 day of March, 2011

JOHN R. HICKMAN
JUDGE

Presented by:

Lisa Wagner
Deputy Prosecuting Attorney
WSB# 14718

FILED
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IN OPEN COURT
MAR 25 2011
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By ..... DEPUTY

Approved as to Form:

Attorney for Defendant
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lw

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APPENDIX B

STATE V BYRD, 2011 WL 2802918 (WASH. APP DIV 3)

--- P.3d ----, 2011 WL 2802918 (Wash.App. Div. 3)
(Cite as: 2011 WL 2802918 (Wash.App. Div. 3))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 3.
STATE of Washington, Appellant,
v.
Lisa Ann BYRD, Respondent.

No. 29056–5–III.
July 19, 2011.

Background: Defendant, who was charged with possession of a controlled substance, filed a motion to suppress evidence. The Superior Court, Yakima County, Blaine G. Gibson, J., suppressed the evidence and dismissed the charge. The State appealed.

Holding: The Court of Appeals, Kulik, J., held that the search incident to arrest exception to the search warrant requirement did not allow police officer to search defendant's purse following her arrest; overruling *State v. Johnson*, 155 Wash.App. 270, 229 P.3d 824.

Affirmed.

West Headnotes

[1] Arrest 35 ⇐71.1(5)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(5) k. Particular Places or Objects. Most Cited Cases

The search incident to arrest exception to the search warrant requirement did not allow police officer to search defendant's purse following her arrest, where defendant was sitting in a patrol car at the time of the search, and the officer was not concerned that defendant had a weapon or that she could destroy evidence; overruling *State v Johnson*, 155 Wash.App. 270, 229 P.3d 824. U.S.C.A. Const.Amend. 4.

[2] Arrest 35 ⇐71.1(1)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(1) k. In General. Most Cited Cases

Arrest 35 ⇐71.1(4.1)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(4) Scope of Search
35k71.1(4.1) k. In General. Most Cited Cases

The search incident to arrest exception permits an officer to perform a warrantless search of an arrestee and the area within his or her immediate control when an arrest is made. U.S.C.A. Const.Amend. 4.

Appeal from Yakima Superior Court; Honorable Blaine G. Gibson, J.Kevin Gregory Eilmes, Prosecuting Attorney's Office, Yakima, WA, for Appellant.

Susan Marie Gasch, Gasch Law Office, Spokane, WA, for Respondent.

PUBLISHED OPINION

KULIK, C.J.

***1** ¶ 1 We recently held in *State v. Johnson*[FN1] that the controlling principles laid out in the United States Supreme Court's opinion in *Arizona v. Gant*[FN2] applied to the search of a vehicle incident to arrest but not to the search of a purse incident to arrest. We now conclude that we were wrong. Here, the defendant sat handcuffed in a patrol car while

police searched her purse. The trial judge suppressed the drug evidence found in her purse based on *Gant*. We affirm that decision and the judgment dismissing the prosecution.

FACTS

¶ 2 Yakima Police Officer Jeff Ely stopped a Honda Civic for using stolen license plates. Officer Ely arrested the driver on an outstanding warrant. The driver told the officer that the car belonged to the passenger, Lisa Byrd.

¶ 3 Officer Ely approached Ms. Byrd. She was sitting in the front passenger seat with a purse on her lap. Officer Ely ordered Ms. Byrd out of the car. He removed the purse from her lap and placed it on the ground outside the car. He arrested Ms. Byrd for possession of stolen property, handcuffed her, and put her in a patrol car. He then searched Ms. Byrd's purse and found methamphetamine and glass pipes with drug residue.

¶ 4 Ms. Byrd was charged with possession of a controlled substance. She moved to suppress the drug evidence, arguing that the search of her purse violated *Gant* and *State v. Valdez*.[FN3] The trial court concluded that the search incident to arrest exception did not authorize the warrantless search of Ms. Byrd's purse. It suppressed the drug evidence and dismissed the charge against Ms. Byrd. The State appeals the suppression ruling.

DISCUSSION

[1] ¶ 5 The State relies on our recent decision in *Johnson* for the proposition that *Gant* does not apply here. In *Johnson,* we indeed held that *Gant* controls the search of a vehicle incident to arrest but not the search of a purse incident to arrest. *Johnson,* 155 Wash.App. at 281, 229 P.3d 824. We now conclude that we were wrong.

¶ 6 In *Johnson,* the defendant was stopped for driving with a suspended license. *Id.* at 274, 229 P.3d 824. She got out of the car with her purse in hand. *Id.* Police arrested, handcuffed, and placed her in a patrol car. The arresting officer then searched her purse and found methamphetamine. *Id.* The defendant's suppression motion was denied, and she was convicted of possession of a controlled substance. *Id.* at 276, 229 P.3d 824. She appealed and urged us to reverse based on the holding in *Gant. Id* at 281, 229 P.3d 824. We concluded that *Gant* did not apply because it "applies to warrantless searches of vehicles incident to arrest." *Id* We concluded that *State v Smith,*[FN4] a 1992 Washington Supreme Court case involving the search of a fanny pack incident to arrest, applied and that the search of the defendant's purse was proper under *Smith. Johnson,* 155 Wn.App. at 282.

¶ 7 *Smith,* however, is based on a seminal case on the issue of a warrantless search of a vehicle incident to arrest—*New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Smith* concluded that *Belton* eliminated the "requirement that a search incident to arrest be justified by separate exigent circumstances." *Smith,* 119 Wash.2d at 680, 835 P.2d 1025. It states, "*Belton* ruled that officers who have made a lawful arrest of a car occupant may search any container found within the passenger compartment of that automobile." *Smith,* 119 Wash.2d at 680, 835 P.2d 1025. *Smith* then declared that, "[p]ursuant to *Belton,* a search incident to arrest is valid under the Fourth Amendment: (1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable." *Id.* at 681, 835 P.2d 1025. The *Smith* court applied this test to the facts before it and held that the search of a secured arrestee's fanny pack was reasonable where the arrestee was wearing the fanny pack just before his arrest and the search was contemporaneous with the arrest. *Id.* at 676, 835 P.2d 1025.

***2** ¶ 8 But in 2009, the United States Supreme Court in *Gant* rejected the well-accepted interpretation that *Belton* authorizes the search of a vehicle incident to a recent occupant's arrest after the arrestee has been secured and cannot access the inside of the vehicle. *Gant,* 129 S.Ct. at 1719. The

Court reaffirmed that the search incident to arrest exception "derives from interests in officer safety and evidence preservation." *Id.* at 1716 It then narrowed the scope of the search incident to arrest exception to include only an arrestee's person and the area within his or her immediate control, which is defined as " 'the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.' " *Id* (quoting *Chimel v. California,* 395 U S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). It noted, "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply " *Gant,* 129 S.Ct. at 1716. *Gant,* therefore, limits *Belton,* in relevant part, to authorizing the "search [of] a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719.

¶ 9 In short, the test announced in *Smith* and applied in *Johnson* is based on a rejected interpretation of *Belton;* an interpretation that *Gant* overruled. We are bound by *Gant's* interpretation of *Belton. Valdez,* 167 Wash.2d at 780, 224 P.3d 751 (Johnson, J., concurring). And, while the State argues that *Gant* should not apply because it involved the search of a vehicle incident to arrest, *Gant* and *Belton* simply applied the general rules of the search incident to arrest exception set out in *Chimel* to the automobile context. A search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse.

¶ 10 *Chimel* did not involve the search of a vehicle. And it "continues to define the boundaries of the [search incident to arrest] exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant,* 129 S.Ct. at 1716.

[2] ¶ 11 Under *Chimel,* then, the search incident to arrest exception permits an officer to perform a warrantless search of an arrestee and the area within his or her immediate control when an arrest is made. *Chimel,* 395 U.S. at 762–63. This type of warrantless search is justified only by interests in officer safety and the preservation of evidence. *Id.* But such a search is unreasonable where the interests justifying it are absent. *Id.* at 768. That is, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. *Gant,* 129 S.Ct. at 1719; *Chimel,* 395 U.S. at 763–64, 768.

***3** ¶ 12 Here, Ms. Byrd was secured in a patrol car when her purse was searched She had no way to access the purse at that time. And the arresting officer was not concerned that she could access a weapon or destroy evidence. The justifications for the search incident to arrest exception, then, did not exist here. The exception did not apply. And the warrantless search of Ms. Byrd's purse violated the Fourth Amendment.

¶ 13 We affirm the trial court's order suppressing the fruit of the search and the judgment dismissing the prosecution.

I CONCUR: SWEENEY, J.

BROWN, J. (dissenting).

¶ 14 Lisa Byrd was sitting in the passenger side of her car when Officer Jeff Ely approached to arrest her for investigation of the stolen license plate on her car. Ms. Byrd's purse was in her lap. Officer Ely ordered her out of the car and removed her purse from her lap. After he arrested her and placed her in a patrol car, he searched the purse for contraband and weapons and found contraband. I do not see how this violates *Arizona v. Gant,* 556 U.S. 332, 129 S.Ct. 1710, 173, 173 L.Ed.2d 485 L.Ed.3d 485 (2009) or the principles we enunciated in *State v. Johnson,* 155 Wash.App. 270, 229 P.2d 824, *review denied,* 170 Wash.2d 1006, 245 P.3d 227 (2010).

¶ 15 Certainly, under *Gant,* the purse was with-

in Ms. Byrd's reach and could even be described as on her person, not only at the stop but at the time of arrest. This case, like *Johnson,* is much like *State v. Smith,* 119 Wash.2d 675, 678, 835 P.2d 1025 (1992), where Mr. Smith's fanny pack fell off during the arrest process and was determined to have been lawfully seized and searched. Here, automobile registration evidence may have been found in Ms. Byrd's purse bearing on the stolen license plates. The purse search was temporally as "contemporaneous" in Ms. Byrd's case as was the search in *Smith.* After all, an officer cannot perform all arrest functions simultaneously.

¶ 16 I would reverse the order suppressing Ms. Byrd's purse, and I see no reason to disapprove *Johnson* Accordingly, I respectfully dissent.

FN1. *State v. Johnson,* 155 Wash.App. 270, 281, 229 P.3d 824, *review denied,* 170 Wash.2d 1006, 245 P.3d 227 (2010).

FN2. *Arizona v Gant,* 556 U.S. 332, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009)

FN3. *State v. Valdez,* 167 Wash.2d 761, 224 P.3d 751 (2009).

FN4. *State v. Smith,* 119 Wash.2d 675, 678, 835 P.2d 1025 (1992).

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